Supreme Court, U.S.
FILED
NOV 12 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-607

In The

Supreme Court of the United States

October Term, 1986

DIAMOND SHAMROCK CORPORATION,

Petitioner,

v.

JOHN HAMILTON, MARTHA FRANCIS, MORRIS A. RICHARDSON, ZINKE & TRUMBO, LTD., ROBERT M. ZINKE, and DAVID B. TRUMBO,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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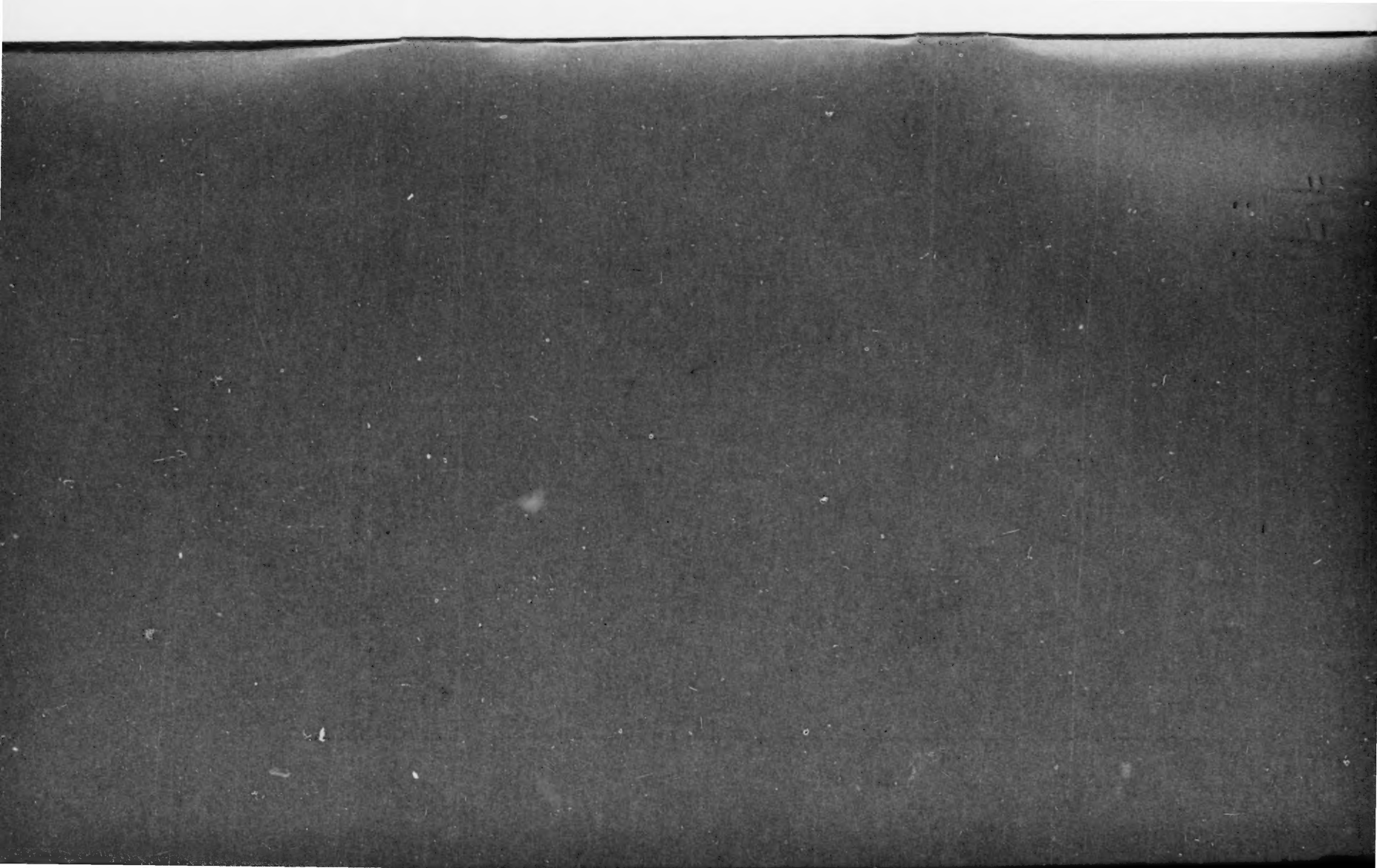

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STATEMENT OF THE CASE

Diamond's Petition rests almost entirely on two premises: that the Court of Appeals' decision was based on Diamond's waiver of its right to object to alleged inconsistencies of the jury verdict; and that the Court of Appeals decided issues beyond those properly before it. Neither premise is true. This Statement of the Case is submitted to set the record straight as to those two premises. No attempt has been made to set forth the detailed evidence that supported the jury's verdict and the Court of Appeals' decision; we respectfully refer the Court to the Opinion below (Pet. App. 1)[1] as to such matters.

Following the first trial of this case, the jury returned a verdict:

> 1) for plaintiff, Diamond Shamrock ("Diamond") against defendant Zinke & Trumbo, Ltd. for the balance of drilling and completion costs due under their Operating Agreement;
>
> 2) for Zinke & Trumbo against Diamond for gross negligence;
>
> 3) for royalty owners Morris Richardson (Zinke & Trumbo lease) and John Hamilton and Martha Francis (Diamond lease) against Diamond for negligence;
>
> 4) for John Hamilton and Martha Francis against Diamond for breach of implied covenant to prevent drainage.

Before the verdict was read, it was shown to counsel for all parties. Counsel were specifically invited to object to inconsistencies. (Pet. App. 6.) Counsel for Diamond, when asked if there was any reason the verdict should not be read

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[1]References to materials included in Appendices to the Petition will be by "Pet. App." and the number of the page on which the material appears in those Appendices.

and recorded, answered "I can think of a lot of reasons, but none that are valid." (Pet. App. 7.)

The jury returned its verdict on a form submitted by the court which required a separate verdict for each separate claim and counterclaim. (The verdict form is reproduced in the Opinion of the court of appeals at Pet. App. 22-23.) The court's instructions did not tell the jury that petitioner's contract claim was inconsistent with the counterclaims against it. (Court Instruction No. 4 is included as Appendix A hereto.)

Nonetheless, after judgment was entered on the verdict, Judge Eubanks granted Diamond's Motion for New Trial on all claims, finding the verdicts to be inconsistent:

> "But that's going to be the order of this Court, and a new trial granted on all aspects of this case. The verdict of the jury vacated, set aside and held for naught as being so terribly inconsistent that this Court cannot in good conscience allow it to stand." (Tr. 1-5-84 at 42.)

At the second trial, the jury returned a verdict only for Diamond on its contract claim after receiving an ad lib instruction from Judge Eubanks that a finding for Diamond on that claim made it unnecessary to decide the remaining claims. (Pet. App. 8.) The Court subsequently ordered another new trial of the Hamilton and Francis claims for breach of implied covenants on its own motion, because of that instruction. At the same time, the Court denied Diamond's Motion for Judgment in Accordance with Motion for Directed Verdict and certified its action on that motion and *both* its new trial orders for interlocutory appeal. The Court of Appeals accepted the appeal. (*Id.*)

Diamond's description of the Certified Interlocutory Order incorrectly suggests that the trial court certified only

the issues relating to the partial new trial granted after the second trial:

> "The trial court certified its interlocutory order granting a new trial on its own motion on Hamilton and Francis' counterclaims for breach of the implied covenants (Paragraphs 1 and 2 above) for immediate appeal pursuant to 28 U.S.C. § 1292(b). App.B. That certified interlocutory order is the subject of the appeal below and of this Petition."

Petition p. 10, ¶ 1.

> "The trial court also certified its judgment on all other claims (Paragraphs 3 through 5 above) as final pursuant to Fed. R. Civ. P. 54(b). App. C. The final judgment on the claims described in Paragraphs 3 through 5 above is the subject of a separate appeal which is still pending before the Tenth Circuit."

Petition p. 10 ¶2. The Order itself unambiguously certifies the first new trial order, as well:

> "6. The denial of Plaintiffs' Motion for Judgment in Accordance with Motion for Directed Verdict, the granting of a new trial upon the Court's own Motion *and the granting of Plaintiff's Motion for New Trial on January 11, 1984 involve controlling questions of law as to which there are substantial grounds for differences of opinion.*

* * *

CERTIFICATION

I hereby certify that the issues disposed of by this Order denying Plaintiff's Motion for Judgment in Accordance with Motion for Directed Verdict and granting a new trial upon the claims of Counterclaimants JOHN HAMILTON and MARTHA FRANCIS for breaches of the implied covenants to protect against drainage and to market, *and by the Order entered on January 11, 1984 granting Plaintiff's Motion for New trial, involve controlling questions of law as to which*

> *there are substantial grounds for differences of opinion and that an immediate appeal from these Orders may materially advance the ultimate termination of this litigation.*" (Emphasis supplied.) (Pet. App. 36-39.)

Petitioner made this same erroneous claim in the Court of Appeals, and respondents quoted the order in response (Response to Petition for Rehearing dated June 30, 1986 attached as Appendix C hereto).

The trial court also certified its judgment on all other issues under Rule 54(b), Federal Rules of Civil Procedure, and all parties appealed.

For reasons unrelated to this Petition, the certified interlocutory appeal was briefed, argued and decided before the 54(b) appeal. No party sought consolidation of the two appeals or delay of the decision here under review. On May 21, 1986, the court below unanimously reversed the trial court's order setting aside the first verdict and remanded with instructions to reinstate the verdict and enter judgment on it. [Pet. App. 21, (Judge Barrett); Pet. App. 34. (Judge McKay); Pet. App. 35, (Judge Tacha).] All three judges concluded that the verdict was not legally inconsistent. [Pet. App. 16-20 (Judge Barrett); Pet. App. 33 (Judge McKay); Pet. App. 35 (Judge Tacha).]

Contrary to petitioner's argument, the decision below was not based on a holding that petitioner waived its right to object to the verdict by its failure to do so before the jury was discharged. Although Judge Barrett reached that conclusion (Pet. App. 20, 21), Judge McKay disagreed (Pet. App. 32-33), and Judge Tacha expressly declined to reach the question (Pet. App. 35). Judge McKay wrote:

> "McKay, Circuit Judge, concurring in part and dissenting in part:
>
> I concur in the result reached by the majority and in the court's conclusion that it is possible to reconcile the apparent inconsistencies in the verdicts returned at the first trial. I have serious misgivings, however, about the majority's reliance on Rule 49(b) of the Federal Rules of Civil Procedure. In my view, Rule 49 does not apply in this case. I therefore dissent from the court's holding that Diamond Shamrock waived its right to object to inconsistencies in the verdicts by failing to object or move for resubmission before the jury was dismissed."

Judge Tacha wrote:

> "I concur only in the portion of the court's opinion that finds that the verdicts in the first trial were not inconsistent and therefore should be reinstated. I think it is unnecessary to reach the Rule 49 question and therefore decline to express an opinion on that issue."

Like its misdescription of the trial court's certification order, petitioner's misdescription of the Court of Appeals' decision was urged in that court and the error explicitly pointed out. (Response to Petition for Rehearing dated June 30, 1986.)

Petitioner sought rehearing, raising all the issues presented here. Rehearing was denied July 16, 1986. (Pet. App. 54) The mandate of the court below is stayed pending disposition of this petition.

The circuit decided the 54(b) appeal on October 21, 1986. Insofar as relevant here, it followed the decision of the first panel as law of the case. A copy of the decision is attached as Appendix B, hereto.

REASONS FOR DENYING CERTIORARI

I. This Case Does Not Present A Conflict Among The Circuits

Diamond's primary claim of a conflict between the circuits is premised on its argument that the court below held that Diamond waived its right to object to the jury's verdict by failing to do so before the jury was discharged. (Pet. beginning at 14.) As pointed out above, the court did not so hold. Instead, the panel unanimously reversed the trial court on the basis that the verdict in this case was not, on the particular facts presented, legally inconsistent. (Pet. App. 16-20, 33, 35.) The panel assigned to the companion appeal below, construes the original decision as we do. (See App. B hereto.)

Petitioner's argument, that a conflict between the circuits exists because the circuit, in this case, failed to give adequate deference to the trial court's discretion, is frivolous. The court of appeals, based on a detailed consideration of the record, found that the verdict was not inconsistent under the instructions given (Pet. App. 19) and that the supposed inconsistency reflected the jury's adoption of Diamond's own trial theory. (*Id.*) The court concluded that the verdict was not inconsistent on its face, repugnant or in irreconcilable conflict:

> "Thus, the claimed inconsistency is between verdicts resolving entirely separate and distinct causes of action. The verdicts on the counterclaims were not required to be consistent with the verdict on Diamond Shamrock's breach of contract claim because the parties and the court submitted the respective claims to the jury for separate, distinct consideration. Thus, there was no inconsistency on the face of the general verdict. The verdicts are not repugnant or in irrecon-

> cilable conflict. This trial involved separate causes of action and the relationship of the parties was not legally identical with regard to each cause of action."

(Pet. App. 20.)

There simply is no case suggesting that any circuit would have deferred to a trial court under similar circumstances. Thus, this claim of conflict among the circuits is really nothing more than a claim that the court of appeals erred in determining the facts of this case.

Moreover, the trial court did not have discretion to set aside a verdict merely because he saw a possible inconsistency. Rather, as the court below held, the trial court had the duty to harmonize the verdicts if it was fairly possible to do so. *Gallick v. Baltimore & Ohio R.R.*, 372 U.S. 108 (1963).

II. The Court Did Not Exceed Its Authority

There can be no question that the trial court certified all issues relating to his order granting a new trial under 28 U.S.C. § 1292(b). (Pet. App. 36, 39.) The Court of Appeals has jurisdiction to conduct such review in appeals under § 1292(b) as may be necessary to determine the validity of the order certified; it is not limited to the issue framed by the trial court or the parties. In *Consolidated Express, Inc. v. New York Shipping Association*, 602 F.2d 494, 502 (3d Cir. 1979), *vacated on other grounds*, 448 U.S. 902 (1980), both parties filed motions to strike portions of their opponents' briefs as being outside the scope of the issues certified. In denying the motions, the court stated:

> "An appeal pursuant to § 1292(b), like any other, is taken from the order of the district court, not from its opinion, and the court is "called upon not to answer the question certified but to decide an appeal."

Accord, Katz v. Carte Blanche Corp., 496 F.2d 747 (3d Cir. en banc 1974), *cert. denied*, 419 U.S. 885; *Dyke v. Gulf Oil Corp.*, 601 F.2d 557 (TECA 1979); *Capital Temporaries, Inc. v. Olsten Corp.*, 506 F.2d 658 (2d Cir. 1974). *In Re: Oil Spill by "Amoco Cadiz,"* 659 F.2d 789, 793 (7th Cir. 1981); *Helene Curtis Industries v. Church & Dwight Co.*, 560 F.2d 1325, 1335 (7th Cir. 1977), *cert. denied*, 434 U.S. 1070, 9 J. Moore, *Moore's Federal Practice* ¶110.25(1) (1985-86 Supplement p. 163). In the analogous situation of an interlocutory appeal from an order granting or denying a preliminary injunction, this Court held that acceptance of an interlocutory appeal authorized the court to consider any issue pertinent to the validity of the order appealed from. *Deckert v. Independence Shares Corp.*, 311 U.S. 282 (1940).

Respondents argued all issues related to the new trial order of January 11, 1984 in their brief in chief. Diamond responded by conceding that there was no inconsistency insofar as the breach of implied covenant to prevent drainage was concerned and by contending that the issue of inconsistency as it related to negligence and gross negligence claims was not before the court. Thus, Diamond took the position that the court could consider the validity of part, but not all, of the January 11, 1984 new trial order. (Appellants' Reply Brief pp. 3-4.) Yet, Diamond made no attempt to obtain a ruling from the court as to the scope of the issues presented, and, indeed, declined to ask the panel to delay this appeal so it could be consolidated with the companion case despite being invited to do so.

Petitioner could have responded to those arguments on their merits, but chose not to do so. Petitioner could have sought a ruling from the court as to the scope of

issues to be considered, as the parties did in *Consolidated Express, infra,* but chose not to do so. Petitioner could have sought consolidation of the two appeals, but chose not to do so.[2] In short, petitioner chose its own destiny, for whatever reasons it deemed sufficient, and should not be heard to complain now.

III. The Court Of Appeals' Decision Was Correct

The truth is that the trial court committed clear error in setting aside the first verdict and that the court of appeals was amply justified in reinstating it. Perhaps the trial court was deceived, by Diamond's constant claim that the contract award necessarily included a finding of good and workmanlike performance, into believing that he had so instructed the jury. Regardless, he unquestionably was operating under some misconception because he set aside, as inconsistent, verdicts on the implied covenant claims which not even Diamond believes are inconsistent. (Pet. 24.)

Perhaps recognizing the impossibility of fairly defending the trial court, petitioner suggests that the trial court did not really set the original verdict aside solely for inconsistency but instead intended to grant the new trial on some other ground. (Pet. p.25.) Petitioner does not now say what that other ground was (Pet. p.25) and has apparently abandoned its argument below that the trial court intended to grant the new trial on all eighteen grounds argued in its motion for new trial. (Appellants'

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[2]Prior to oral argument in this case, the court invited counsel to comment on whether argument should be delayed until the other appeal caught up. No objection to proceeding was made.

Reply Brief p.20.) There is no room for a contention that the new trial was based on anything but inconsistency of the verdict. The trial judge repeatedly said so, and Diamond has never found any indication in the record that supports the presence of any other basis for his action. The trial judge's comments are utterly unambiguous:

> "[T]his is an inconsistency that we just absolutely cannot live with." (Tr. 1-5-84; R. Vol. XI at 41.)
>
> "I just think in my own mind that the verdict is so inconsistent with respect to the findings on all of the claims that I have just got to set it aside and start over." (*Id.* at 42.)
>
> "But that's going to be the order of the Court, and a new trial granted on all aspects of this case. The verdict of the jury vacated, set aside and held for naught as being so terribly inconsistent that this Court cannot in good [conscience] allow it to stand." (*Id.* at 42.)

Finally, petitioner has sprinkled numerous one line complaints about either the decision below or the sufficiency of the evidence to support the original verdict. These have nothing to do with the issues raised by the Petition, have all been considered and rejected on their merits below, and merely serve to underline that this Petition presents no substantial issues for review. It is simply an attempt to get this Court to redo the detailed review of the trial court action, on the particular facts, that the court of appeals was supposed to perform, and did.

———o———

CONCLUSION

Petitioner has failed to demonstrate any need for review by this Court. The court of appeals did its job thoroughly and correctly, and the Petition ought to be denied.

Respectfully submitted,

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APPENDIX A

INSTRUCTION NO. 4

PLAINTIFF'S CLAIM

The plaintiff's sole cause of action is against the defendants, Zinke & Trumbo, Ltd., Robert M. Zinke and David B. Trumbo, for breach of contract. In order to prevail upon this claim, the plaintiff must establish all of the following elements by a preponderance of the evidence.

1. That the defendant, Zinke & Trumbo, Ltd., elected to participate in the completion of the well; and

2. That the plaintiff, Diamond Shamrock Corporation, has substantially performed its duties under the terms and conditions of the operating agreement.

With regard to the first element, you are instructed that the adequacy of the election must be determined pursuant to the terms of the operating agreement. You will be subsequently instructed on contract interpretation.

You are instructed that substantial performance means performance of the essential elements of the contract.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

Nos. 85-1653
& 85-1765

(D.C. No. 82-1754-E)
(W.D. Okla.)

DIAMOND SHAMROCK CORPORATION,
a Delaware corporation,

Plaintiff-Appellee
Cross-Appellant,

v.

ZINKE & TRUMBO, LTD., a business association; ROBERT M. ZINKE, an individual; and DAVID B. TRUMBO, an individual,

Defendants-Appellants
Cross-Appellees,

MORRIS A. RICHARDSON; JOHN HAMILTON; MARTHA N. FRANCIS,

Counterclaimants-Appellants
Cross-Appellees.

ORDER AND JUDGMENT
(Filed October 21, 1986)

Before BARRETT and BALDOCK, Circuit Judges, and CONWAY, District Judge.*

*The Honorable John E. Conway, United States District Judge for the District of New Mexico, sitting by designation.

After examining the briefs and the appellate record, this three-judge panel has determined unanimously that

oral argument would not be of material assistance in the determination of this appeal and cross-appeal. *See* Fed. R. App. P. 34(a); Tenth Cir. R. 10(e). The cause is therefore ordered submitted without oral argument.

These are an appeal and cross-appeal from a district court order entered after the second trial of the parties' claims. The facts are set out in detail in this court's earlier opinion, Diamond Shamrock Corp. v. Zinke & Trumbo, Ltd., 791 F.2d 1416 (10th Cir. 1986), but an overview is necessary for an understanding of the issues now before the court.

Plaintiff and defendants agreed to jointly develop the Hamilton Well on Section 33, a 640-acre tract of land in Oklahoma. They signed a contract under which defendants agreed to reimburse plaintiff for one-fourth of the development costs. Counterclaimants, who were the owners of the mineral estate underlying Section 33, were not parties to the contract.

When defendants refused to pay plaintiff the full amount which plaintiff thought was required by the contract, plaintiff sued defendants for breach of contract. Defendants denied liability and filed a counterclaim against plaintiff for gross negligence and breach of a new contract. Counterclaimants joined the suit, seeking damages from plaintiff for negligence. John Hamilton and Martha N. Francis, the two counterclaimants who owned the mineral interests underlying the land leased by plaintiff, also counterclaimed for breaches of implied covenants that plaintiff would market the gas and protect against drainage.

All of these claims were tried to a jury for the first time in 1983. The jury returned the following verdict: (1) for plaintiff against defendants on plaintiff's claim for breach of contract, (2) for defendants against plaintiff on defendants' claim for gross negligence, (3) for plaintiff against defendants on defendants' claim for breach of a new agreement, (4) for counterclaimants against plaintiff on counterclaimants' claim for negligence, and (5) for Hamilton and Francis on their claim that plaintiff had breached an implied covenant to protect against drainage, but against them on their claim that plaintiff had breached an implied covenant to market.

After the trial, plaintiff moved for judgment notwithstanding the verdict or for a new trial. It argued that the jury's finding that defendants had breached the contract was irreconcilably inconsistent with the jury's findings that plaintiff had been negligent and grossly negligent. On January 11, 1984, the district judge entered an order denying plaintiff's motion for judgment notwithstanding the verdict and granting plaintiff's motion for new trial. We will refer to this order as the first new trial order.

The same claims were tried to a second jury in 1985. That jury found for plaintiff on its claim that defendants had breached the contract, but did not fill in any of the remaining blanks on the verdict form. On April 18, 1985, the district court entered a "Journal Entry of Judgment," which certified the following verdict as final pursuant to Fed. R. Civ. P. 54(b): for plaintiff on its claim that defendants had breached the contract, against defendants on all of their counterclaims, and against counterclaim-

ants on their negligence claim. The appeal and cross-appeal now before this court, Nos. 85-1653 and 85-1765, are from this Rule 54(b) judgment.

On April 18, 1985, the district judge also issued a certified interlocutory order that (1) denied plaintiff's motion for judgment in accordance with its motion for directed verdict, (2) on the court's own motion, ordered a new trial with respect to John Hamilton's and Martha N. Francis' claims that plaintiff had breached two implied covenants, and (3) certified this interlocutory order *and* the first new trial order for immediate appeal pursuant to 28 U.S.C. § 1292(b). The appeal and cross-appeal from this certified interlocutory order have already been decided by this court. *See* Diamond Shamrock Corp. v. Zinke & Trumbo, Ltd., 791 F.2d 1416 (10th Cir. 1986). There, this court held that the jury verdict at the first trial had been consistent, so a new trial should not have been granted. Accordingly, the judgment of the district court was reversed and the matter was remanded with instructions to reinstate the first jury verdict.

In the appeal and cross-appeal now before the court, plaintiff argues that (1) the correctness of the first new trial order is now properly before the court for the first time; (2) the first new trial order was correct; and (3) if it was not correct, any error was harmless because plaintiff's alternative motion for judgment notwithstanding the verdict after the first trial should have been granted. We disagree with each of these arguments, as explained below.

In the order appealed from in the prior appeal and cross-appeal, the district judge had explicitly certified the first new trial order for immediate appeal. Accordingly,

the question of whether the district court had erred by entering the first new trial order was properly before this court in the prior appeal and cross-appeal. We reject plaintiff's first argument.

This court's prior opinion was proper and is binding on us as the law of the case. In that opinion, this court determined that the first jury verdict was consistent and that, as a result, new trial should not have been granted. We reject plaintiff's second argument for this reason.

Therefore, the only remaining controversy in the appeal and cross-appeal now before us is whether plaintiff is correct that the first new trial order was harmless error. This argument is based on the premise that the district could should have granted plaintiff's motion for judgment notwithstanding the verdict after the first trial. To obtain appellate relief on this ground, plaintiff would first have to show that, viewing the evidence in the light most favorable to defendants and counterclaimants, there was no evidence upon which the first jury's verdict could properly have been based. *See* Mackey v. Burke, 751 F.2d 322, 325 (10th Cir. 1984); 9 C. Wright & A. Miller, Federal Practice and Procedure § 2524.

Having reviewed the record on appeal we conclude that plaintiff failed to satisfy this test. The transcript of the first trial shows that the testimony of at least three witnesses, Mr. Barry. Professor Blick, and Mr. Kelly, supported the jury's finding that plaintiff had been negligent with respect to counterclaimants and grossly negligent with respect to defendants. The transcript also shows that Mr. Barry presented evidence upon which the jury could properly have based the damage awards.

We agree with defendants and counterclaimants that, since this court has ordered the verdict of the jury at the first trial to be reinstated, their claim that the district court erroneously excluded evidence from the second trial is moot. As a result, we express no opinion on the merits of that claim.

The judgment of the United States District Court for the Western District of Oklahoma is REVERSED and the case is REMANDED with instructions that the district court reinstate the general verdict of the jury at the first trial and enter judgment thereon.

The mandate shall issue forthwith.

/s/ ROBERT L. HOECKER, Clerk

APPENDIX C

No. 85-1698

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

DIAMOND SHAMROCK CORPORATION,
a Delaware corporation,

Appellant,

v.

ZINKE & TRUMBO, LTD.,
a business association

and

MORRIS A. RICHARDSON, JOHN HAMILTON and MARTHA FRANCIS
Cross-Appellants
and Appellees

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

CIV-82-1754-E

HONORABLE LUTHER B. EUBANKS, DISTRICT JUDGE

RESPONSE TO PETITION FOR REHEARING

(Filed June 30, 1986)

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June 1986

Diamond's Petition for Rehearing is based on a rehash of arguments previously made, and on a mischaracterization of the Court's decision which is advanced as an inconsistency with prior decisions of the Court. Neither provides a substantial basis for granting rehearing.

STATEMENT OF THE CASE

Following the first trial of this case, the jury returned a verdict:

> 1) for plaintiff, Diamond Shamrock ("Diamond") against defendant Zinke & Trumbo, Ltd. for the balance of drilling and completion costs due under their Operating Agreement;
>
> 2) for Zinke & Trumbo against Diamond for gross negligence;
>
> 3) for royalty owners Morris Richardson (Zinke & Trumbo lease) and John Hamilton and Martha Francis (Diamond lease) against Diamond for negligence;
>
> 4) for John Hamilton and Martha Francis against Diamond for breach of implied covenant to prevent drainage.

Before the verdict was read, it was shown to counsel for all parties. Counsel were specifically invited to object to inconsistencies. (Tr. 11-1-83 at 46.) Counsel for Diamond, asked if there was any reason the verdict should not be read and recorded, answered "I can think of a lot of reasons, but none that are valid." (Id.)

Nonetheless, after judgment was entered on the verdict, Judge Eubanks granted Diamond's Motion for New Trial on all claims, finding the verdicts to be inconsistent:

> "But that's going to be the order of this Court, and a new trial granted on all aspects of this case. The verdict of the jury vacated, set aside and held for naught as being so terribly inconsistent that this Court cannot in good conscience allow it to stand." (Tr. 1-5-84 at 42.)

At the second trial, the jury returned a verdict only for Diamond on its contract claim after receiving an ad lib instruction from Judge Eubanks that a finding for Diamond on that claim made it unnecessary to decide the remaining claims. (85 TR Vol V p. 1138.) The Court subsequently ordered a new trial on its own motion, because of that instruction, of the Hamilton and Francis claims for breach of implied covenants. At the same time, the court denied Diamond's Motion for Judgment in accordance with Motion for Directed Verdict and certified its action on that motion and both its new trial orders for interlocutory appeal.[1] This Court accepted appeals on all issues certified. Pursuant to Rule 28(b), Diamond as plaintiff below is deemed the appellant.

The trial court also certified its judgment on all other issues under Rule 54(b), Federal Rules of Civil Procedure and appeal from that judgment is pending in this Court under case number 85-1765.

The Case was argued on January 28, 1986, and decided on May 21, 1986. The Court unanimously concluded that the trial court erred in setting aside the original jury verdict and remanded the case with instructions to reinstate that verdict and enter judgment on it.

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[1]Despite Diamond's suggestion to the contrary, the trial court did not limit its certification to any particular issues involved in the new trial orders. (Copy attached hereto).

I. The court's decision was not based on a holding that Diamond waived its right to object to inconsistencies.

Diamond devotes a large part of its argument for rehearing to the question of whether it waived its right to object to the first verdict for inconsistency by failing to do so before the jury was discharged (Pet. ¶ 3, 4, 6, 7).

Judge Barrett's opinion concludes, and we believe properly, that Diamond's failure to object to the original verdict before the jury was discharged despite being expressly invited to do so, waived its right to do so later (p. 18). Judge McKay (p. 12) disagreed. Judge Tacha expressly declined to decide that issue as being unnecessary to decision of the case. Thus, the Court had no majority decision on this point. Nonetheless, Diamond's Petition for Rehearing asserts that the Court held that it waived its rights and asserts that such holding was inconsistent with prior decisions (Pet. at ¶ 3). Since there was in fact no majority holding on this issue, there is no reason to address whether it would have been inconsistent with prior decisions or not. In truth, no prior decision of this Court has resolved the precise issue involved.

II. Demand is not a prerequisite to a damage action for breach of implied covenants.

There is no Oklahoma decision that holds, or that can fairly be read as suggesting, that demand is a prerequisite to a pure damage action for breach of the implied covenant to prevent drainage. Every case cited by Diamond as supporting the existence of a demand requirement involved a claim for forfeiture of the lessee's interest.

More importantly, a demand requirement in a damage action makes no sense particularly where, as here, it was the lessee itself that drilled the robber well. This is best illustrated by focusing, as the Court did in oral argument, on drainage that takes place before demand is made. If demand is required, and made, does the royalty owner have the right to recover damages suffered prior to demand, or not? If he does, the demand requirement is a meaningless formality. If pre-demand damages are denied, the law has given the lessee a license to steal as long as he quits when he gets caught. There is no reason to believe that Oklahoma would adopt a demand requirement that would of necessity be either a useless formality or an immunization of wrongful conduct predating demand.

Moreover, at least two Oklahoma cases have awarded damages for breach of implied covenants without mentioning any demand requirement. *North American Petroleum Co. v. Knight,* 321 P.2d 964 (Okla. 1958); *Junction Oil & Gas Co. v. Pratt,* 99 Okla. 14, 225 P. 717 (1924), and both Professor Merrill and Professor Hemingway have concluded that demand is not, and should not be, required in a demand action.

> "First impression suggests that there should be no difference in the treatment of cases invoking the two remedies. Reflection calls to mind that there are distinctions between the two which may justify divergent treatment. Forfeiture is a harsh remedy which wipes out the lessee's interest. Damages are drawn merely from his pocketbook. Presumably he is cognizant of his own dilatory conduct, which he should know subjects him to liability. He may not guess that the lessor will demand forfeiture. Forfeiture springs

> from a determination to put an end to the relationship between lessor and lessee. The recovery of damages is consistent with its continued existence. Damages may accrue for a long period before the lessor is cognizant of their occurrence. His inability to give notice of what he does not know should not bar him from recovery nor subject him to delay. By forfeiture, on the other hand, he gets his land free from the incumbrance of the lease, frequently with damages as well. Delay in that case is not so harmful to him. The purpose of the notification in forfeiture cases is to enable the lessee to perform his duty and save his interest. In damage cases, no such purpose is served, for the lessee already has laid himself liable to pay for the harm done."

M. Merrill, *Covenants Implied in Oil and Gas Leases at 421*

> "Where the remedy pursued is that of damages, notice, other than filing of suit, is normally not required."

R. Hemmingway, *Oil and Gas* § 8.11 p 450 (2d ed. 1983).

Spaeth v. Union Oil Co., 710 F.2d 1455 (10th Cir. 1983) is not to the contrary. This court did not there have presented the issue of whether demand was a prerequisite to a damage action. *Spaeth* involved both cancellation and damages, and *Spaeth* quoted from *Vincent v. Tideway Oil Programs, Inc.*, 620 P.2d 910, 916 (Okla. App. 1980), a cancellation case. There is nothing in the Spaeth opinion to indicate that it intended to hold that demand was a prerequisite to a pure damage suit.

Plains Petroleum Corp. v. Fine, 174 Okla. 570, 51 P.2d 284 (1935) offers no support to Diamond's position. It involved a lessee who held leases on two adjoining tracts. He drilled a producer on one and surrendered his lease on the other. No drainage occurred before the surrender. The court declined to extend the covenant to protect

against drainage to require the lessee to drill a protective well after his surrender of the lease. In short, the case is totally irrelevant.

Diamond wants a directed verdict based on a proposition of law that no Oklahoma case or statute has adopted, despite being denied that directed verdict by the trial judge sitting in Oklahoma no less than four times, and despite clear lack of reason to believe demand would have served any useful purpose. This court should not grant it.

CONCLUSION

Diamond's claim that the Court's decision is inconsistent with prior decisions is based on a mischaracterization of the Court's opinion. Diamond's demand argument is unsupported by either reason or authority. The other arguments advanced for rehearing are repetitious of arguments that were insubstantial to begin with. The Court has reached a correct and just result, and rehearing ought to be denied.

/s/ Richard C. Ford,

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ATTORNEYS FOR CROSS-APPELLANTS
AND APPELLEES

CERTIFICATE OF CERVICE

This will certify that a true and correct copy of the foregoing Response to Petition for Rehearing was duly mailed postage prepaid thereon, to H. B. Watson, Jr., Richard K. Books, and Sharon L. Taylor of Watson & McKenzie, 1900 Liberty Tower, Oklahoma City, Oklahoma 73102, on this 27th day of June, 1986.

/s/ Richard C. Ford,

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

No. CIV-82-1754-E

DIAMOND SHAMROCK CORPORATION, a Delaware corporation,

Plaintiff,

vs.

ZINKE & TRUMBO, LTD., a business association; ROBERT M. ZINKE, an individual; and, DAVID B. TRUMBO, an individual,

Defendants,

and

MORRIS A. RICHARDSON, JOHN HAMILTON, and MARTHA FRANCIS,

Counterclaimants.

CERTIFIED INTERLOCUTORY ORDER
(Filed April 18, 1985)

On this 28th day of March, 1985, Plaintiff's Motion for Judgment in Accordance with Motion for Directed Verdict came on for hearing before the Court, all parties being represented by their attorneys of record herein, and the parties having presented their authorities and arguments and based upon the record in this case, the Court hereby finds as follows:

1. That Plaintiff's Motion for Judgment in Accordance with Motion for Directed Verdict should be denied.

2. That on February 11, 1985, the above cause and all counterclaims permitted by the Court to be heard by the jury came on for trial before the Court and jury and that, on February 19, 1985, the jury returned its verdict. By its Journal Entry of Judgment, the Court has rendered judg-

ment in favor of Plaintiff and against Defendants in the amount of $220,830.34 and further against Defendants on their counterclaims of gross negligence, breach of oral contract and kickbacks including punitive damages, and against Counterclaimants on their claim of negligence.

3. The Court's oral instructions to the jury, explaining the verdict forms, may be erroneous and the jury failed to return a verdict either for or against Counterclaimants JOHN HAMILTON and MARTHA FRANCIS on their counterclaims for breaches of the implied covenants to protect against drainage and to market.

4. The Court finds, on its own Motion and pursuant to its letter to counsel for all parties in this case dated February 20, 1985, which is on file in this case, that a new trial should be granted on Counterclaimants JOHN HAMILTON and MARTHA FRANCIS' counterclaims for breach of the implied covenant to market and to protect against drainage.

5. Two jury trials have been held in this case, the Court having previously granted Plaintiff's Motion for New Trial filed after the first jury trial by its Order entered on January 11, 1984.

6. The denial of Plaintiffs' Motion for Judgment in Accordance with Motion for Directed Verdict, the granting of a new trial upon the Court's own Motion and the granting of Plaintiff's Motion for New Trial on January 11, 1984 involve controlling questions of law as to which there are substantial grounds for differences of opinion.

7. An immediate appeal from the rulings specified in Paragraph 6 above may materially advance the ultimate determination of the litigation.

8. An immediate appeal from the rulings herein will prevent protracted and expensive litigation. This matter has been pending for two and one-half years and two lengthy jury trials have been held on these claims, the Court having previously granted a motion for new trial after the first jury trial was held.

9. An immediate appeal will expedite the ultimate termination of this litigation and thereby save unnecessary expense and delay.

10. This Court has directed the entry of final judgment with respect to all other claims in this action, with the exception of JOHN HAMILTON and MARTHA FRANCIS' counterclaims for breach of the implied covenant to market and to protect against drainage. This Court has certified such judgment for immediate appeal pursuant to Rule 54, Fed. R. Civ. P. Thus piecemeal appeals will be avoided by certification of the controlling questions of law involved in these interlocutory orders because all issues can be appealed at the same time.

11. An immediate appeal may avoid a third jury trial on the claims for failure to market and protect against drainage because the incorrect disposition of the controlling questions of law raised by the rulings herein would require reversal of the orders granting a new trial and/or the order denying Plaintiff's Motion for Judgment in Accordance with Motion for Directed Verdict and the reversal of any judgment rendered on a jury verdict after third new trial.

12. An immediate appeal would more efficiently dispose of this litigation under the circumstances of this case.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that Plaintiff DIAMOND SHAMROCK COR-

PORATION's Motion for Judgment in Accordance with Motion for Directed Verdict is denied.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that a new trial is hereby granted on Counterclaimants JOHN HAMILTON and MARTHA FRANCIS' counterclaims for breaches of the implied covenants to market and to protect against drainage.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the new trial hereby granted is stayed until the Court of Appeals disposes of the interlocutory appeal brought from these rulings or until the time for interlocutory appeal has passed without the parties having filed such an appeal.

CERTIFICATION

I hereby certify that the issues disposed of by this Order denying Plaintiff's Motion for Judgment in Accordance with Motion for Directed Verdict and granting a new trial upon the claims of Counterclaimants JOHN HAMILTON and MARTHA FRANCIS for breaches of the implied covenants to protect against drainage and to market, and by the Order entered on January 11, 1984 granting Plaintiff's Motion for New trial, involve controlling questions of law as to which there are substantial grounds for differences of opinion and that an immediate appeal from these Orders may materially advance the ultimate termination of this litigation.

Dated this 18 day of April, 1985.

/s/ Luther B. Eubanks
The Honorable Luther B. Eubanks,
Chief Judge United States District
Court, Western District of Oklahoma

Entered In Judgment Docket 4-18-85

Approved as to form:

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ATTEST: A true copy of the original
Francis C. Bonsiero, Clerk

By Nancy Estep
Deputy